No. 509

IN THE

SUPREME COURT OF THE UNITED STATES

OF AMERICA

(OCTOBER TERM A. D. 1947)

HARRY R. RANDALL, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Reported below ..... F. (2d) .....

TO THE HONORABLE CHIEF JUSTICE, and THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

A. SUMMARY STATEMENT OF MATTERS INVOLVED

The indictment and subsequent proceedings

The petitioner was indicted in the Southern District of Indiana (filed September 20, 1946), such indictment charging that petitioner conspired with one Sterling J. Perry, an officer of the National City Bank of Evansville, Indiana, a member bank and an insured bank as defined by Sections 221-225 and Sec. 264 of

Title 12, United States Code, and other persons unknown to the Grand Jury for the said Perry to embezzle, abstract and wilfully misapply the funds and credits of said bank with the intent on the part of the petitioner to injure and defraud said bank, and to deceive the officers of said bank, the Comptroller of the currency, the Federal Deposit Insurance Corporation and all the agents and examiners of said bank; the indictment alleges that such conspiracy began on or about the first day of January, 1940, and to; and was in existence until, May 27, 1947, and it alleges that to effect the object of said conspiracy the petitioner (and others) committed 34 overt acts; a second count charges that petitioner aided and abetted Sterling J. Perry in committing offenses against said bank, but incorporated such offenses by reference to another indictment returned against Perry. (R. page 1 to 12 inc.)

The trial court dismissed the second count of the indictment on motion of the petitioner (R. 27) and the trial on the merits was had on the first count beginning December 9, 1947, and testimony concluded on December 12, 1947 (R. 31 to 310). A motion for an instructed verdict was made at the close of the Government's evidence (R. 191) and renewed at the close of the defendant's evidence (R. 310). The court refused both such motions and the defendant excepted. (R. 310.)

The District Court submitted the case to a jury and a verdict of guilt was returned and the defendant filed a motion for a new trial which was overruled by the Court (R. 331). The defendant was sentenced to two

years imprisonment and a fine of Five Thousand Dollars (R. 333).

The Circuit Court of Appeals based its affirmance of the case on the theory that there was substantial evidence, direct or circumstantial, to support the verdict of the jury.

The District Court filed no written opinion. The Circuit Court of Appeals, in affirming, wrote an opinion dated November 3, 1947. Opinion by Justice KERNER, and District Judge LINDLEY, Chief Justice SPARKS dissenting without written opinion.

A Motion for Rehearing was overruled on December 8, 1947. (R. .....)

JURISDICTION

The jurisdiction of this court is invoked under Judicial Code, Sec. 256, as amended (28 U. S. C. A. 37a). The judgment of the Circuit Court of Appeals was entered November 3, 1947 (R. .....). Rehearing was denied December 8, 1947 (R. .....).

QUESTIONS PRESENTED

I. The evidence fails to support the verdict and judgment entered thereon, because the evidence as a whole is insufficient to support the verdict of the jury and the judgment of the court.

II. The evidence fails to support the verdict and judgment because the evidence is insufficient to show that the defendant, Randall, had any knowledge of, or participated in, any conspiracy with Perry, or any

other person or persons, or had any agreement with said Perry or any other person, express or implied, to violate any law as charged in the indictment.

III. The substantial evidence adduced on the trial does not exclude every other reasonable hypothesis except the guilt of defendant Randall; it was therefore the duty of the Trial Court to instruct the jury to return a verdict of not guilty and in failing so to do, it was the duty of the Appellate Court to reverse a judgment of conviction.

SPECIFICATION OF ERROR

The Circuit Court of Appeals erred in affirming the judgment of conviction of the petitioner, and in failing to reverse the judgment and order a new trial.

The Circuit Court of Appeals erred in applying the law to the facts in this case in holding that the question involved in the appeal was whether there was substantial evidence to support the judgment, direct or circumstantial, because the law as applied to this case is that the evidence should be such as to exclude every other reasonable hypothesis except that of the guilt of the defendant.

LAWS INVOLVED

Section 88, Title 18, U. S. C. A. (Section 37 of the Criminal Code) being the conspiracy statute, and sections 221-225 and section 264, Title 12, U. S. C. A.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The holding of the Circuit Court of Appeals for the Seventh Circuit in this case to the effect: "*That an appellate court in examining the record must take that view of the evidence most favorable to the plaintiff and must give to the plaintiff the benefit of all inferences which reasonably may be drawn from the evidence. In such appeals the question is not whether the evidence is sufficient to prove defendant's guilt beyond a reasonable doubt, but rather whether the verdict is supported by any substantial evidence, direct or circumstantial.* Such holding is in direct conflict with the holding of the Ninth (9th) Circuit Court of Appeals in the case of *Karns vs. U. S.*, 158 F. (2d) 568, to the effect: *The evidence should be required to point so surely and unerringly to the guilt of the defendant as to exclude every reasonable hypothesis but that of guilt.*"

The testimony in this case adduced to establish the alleged conspiracy was wholly circumstantial, and so recognized by the trial court in its charge to the jury (R. 321) and they are not inconsistent with the defendant's protested innocence, indeed they amount to nothing more than suspicion.

This court is sensible to the necessity of apprehending criminals, and of the advantage to society of having criminals suffer for their offenses; but it is equally sensible to the upholding of sound and tried principles of law, which protect the innocent and safeguard individual rights and liberties, the restriction of which

brought this nation into being. When men are convicted and every right the genius of their country gives them have been exhausted—they can submit, when however, substantial rights are denied and that denial sanctioned by the courts, they can but despair; in the first instance we find vindication of democracy, but in the latter case, there no longer exists a reason for the courts, for justice is no more.

Coming to the facts in this case we find that Perry, an officer of the National City Bank, and one of the officers whose duty and privilege it was to loan money of the bank to its customers. The defendant, being a customer of the bank, needed financial assistance and appealed to Perry. Relief was granted and there developed a custom between Perry and the petitioner Randall, unorthodox perhaps, but certainly not unusual, the practice of the defendant writing what is called in the record "no-fund" checks which were honored by the bank, and which defendant treated as a loan. It so happened that the officer of the bank was defaulting and abstracting the funds of the bank, not only the funds which were paid out on the "no fund" checks, but also other funds to other people.

Does the fact that the defendant was the recipient of abstracted funds, although abstracted with his knowledge or consent, make him a party to the wilful abstract of such funds? We think not. In the instant case the record shows no knowledge on the part of Randall.

In *Dickerson vs. U. S.*, 18 F. (2d) 887, the court aptly expresses our view of the law of the instant case,

which we think was here misapplied by the Circuit Court of Appeals. The court there said "*We think the most that can be said of this testimony is that it creates some suspicion*, or gives rise to an inference, that the plaintiffs in error might have some knowledge of the conspiracy at the time they purchased the liquor from one or another of the conspirators." And again in the case of *McLaughlin vs. United States*, 25 F. (2d) 1, in discussing a conspiracy the court said: "*Unless there is substantial evidence of facts which exclude every other reasonable hypothesis than the guilt of the accused it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.*"

2. *In sustaining the trial's court refusal to instruct a verdict for the defendant, and in affirming the judgment of the trial court the appellate court has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by a lower court as to call for an exercise of the court's power of supervision.*

The burden of proof in all criminal cases rests on the prosecution. If the Government failed the quantum of proof necessary to establish the guilt then it was the trial court's duty to instruct a verdict, and if the trial court failed in that duty it was the duty of the appellate court to rectify that error by reversing the judgment. This the appellate court did not do,

and which we think is in conflict with the *McLaughlin case, supra.*

The authorities are too well settled and too numerous to burden this court. The *Karn case supra* states the rule plainly. When charged with crime, a citizen is entitled to be tried in a fair an impartial manner according to law. He is entitled to be confronted with the witnesses against him. He is entitled to demand that the prosecution prove him guilty, not by suspicions, but by facts. When the prosecution fails, as it did utterly in this case, he is entitled to an instructed verdict.

In this case it is not a question of a difference of opinion (as suggested by the Court of Appeals) in which ordinary men may differ, but one in which the inescapable conclusion drawn from all the testimony both direct and circumstantial is that the conduct of petitioner was consistent with his innocence, thus bringing this case under the rule in *Karn* and *McLaughlin cases.* Not only is it true, but also the scienter is entirely missing.

Again we quote from the *Ridenour case* (3rd circuit) which itself quotes from the case of *Hart vs. United States,* 84 F. 799. *"Unless there is substantial evidence of facts which excludes every other hypothesis but that of guilt, it is the duty of the court to return a verdict for the accused; and where all the evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction."*

The Circuit Court of Appeals in this case has so

far departed from the established rule of law as announced in the *Hart case* supra, as to call for an exercise of the courts supervisory powers.

None of the cases cited by the court in affirming the Randall case, can give any support to the court's departure. In *Ray vs. U. S.*, 114 F. (2d) 508, cited by the Circuit Court of Appeals, the facts were so far different from the instant case as to call for an entirely different rule of law. Beyond the fact that the defendants were in each case, indicted, tried and convicted there is little similarity between them and the present case.

In this *Ray case*, the Circuit Court of Appeals opinion citing would indicate that knowledge on the part of Randall was not necessary. But there has to be a mutual meeting of the minds. The *Ray case* is different from the *Randall case*, because the opinion in the *Ray case* stated: "She (the defaulting banker—parenthesis inserted) stated that she often throughout the period discussed the situation with him, that he promised to use the money from the sale of a Mine * * * to repay the bank, but that he always failed to do so." "He denied that his codefendant Shutte notified him of large overdrafts, or of her efforts and methods to conceal them." So, there was knowledge on the defendant's part, if the jury believed the banker's testimony. But, decidedly, that kind of testimony was not in the record in the *Randall case*.

CONCLUSION AND PRAYER

For the foregoing reason your petitioner, by his solicitor, respectfully prays that a Writ of Certiorari issue to the Circuit Court of Appeals for the Seventh Circuit, to the end that the cause may be reviewed and determined by this Court and the judgment of the Circuit Court of Appeals reversed.

Respectfully submitted,

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